

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-CV-00329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY
IN FURTHER SUPPORT OF ITS OPPOSITION TO "PETERSON FARMS, INC.'S
MOTION TO DISMISS AND, OR IN THE ALTERNATIVE, MOTION TO STAY
PROCEEDINGS PENDING APPROPRIATE REGULATORY AGENCY ACTION"**

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and provides notice of its filing of supplemental authority in further support of its opposition to "Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Action" [DKT #75].

1. In "Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Action" [DKT #75], pp. 30-32, Defendant Peterson argued that a finding by the Executive Director of the Oklahoma Department of Environmental Quality under subparagraph B of 27A Okla. Stat. § 2-6-105 is required before liability may attach under subparagraph A.¹

¹ 27A Okla. Stat. § 2-6-105 reads:

2. In "Plaintiff's Response in Opposition to 'Peterson Farms, Inc.'s Motion to Dismiss and, or in the Alternative, Motion to Stay Proceedings Pending Appropriate Regulatory Action" [DKT #134], pp. 24-25, the State argued that a finding by the Executive Director of the Oklahoma Department of Environmental Quality under subparagraph B of 27A Okla. Stat. § 2-6-105 was not a prerequisite to its action under 27A Okla. Stat. § 2-6-105(A).

3. While the Court denied the Peterson Defendant's motion (except with respect to the extraterritorial application of 27A Okla. Stat. § 2-6-105), *see* DKT #1187 & #1202, at the June 15, 2007 oral argument the Court expressed interest in an appeal to the Tenth Circuit in another case of the question of whether a finding by the Executive Director of the Oklahoma Department of Environmental Quality under subparagraph B of 27A Okla. Stat. § 2-6-105 was a prerequisite to an action under 27A Okla. Stat. § 2-6-105(A).

4. The Tenth Circuit has now ruled on that appeal. *See Burlington Northern & Santa Fe Railway Co. v. Grant*, 2007 WL 2758502 (10th Cir. Sept. 24, 2007) (attached as Exhibit 1).

5. In that case, the Tenth Circuit stated:

We conclude that the district court erred in holding that ODEQ enforcement action was a precondition to the existence of a public nuisance. To begin with, the language of Okla. Stat. tit. 27A, § 2-6-105 is unambiguous. Nothing in the

A. It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.

B. If the Executive Director finds that any of the air, land or waters of the state have been, or are being, polluted, the Executive Director shall make an order requiring such pollution to cease within a reasonable time, or requiring such manner of treatment or of disposition of the sewage or other polluting material as may in his judgment be necessary to prevent further pollution. It shall be the duty of the person to whom such order is directed to fully comply with the order of the Executive Director.

plain language of Okla. Stat. tit. 27A, § 2-6-105 requires an order by the Executive Director of the ODEQ before an act can be declared a public nuisance. Nothing in subsection B purports to limit the scope of subsection A's definition of the term "public nuisance." See *Cox v. State ex rel. Okla. Dep't of Human Servs.*, 87 P.3d 607, 617 (Okla. 2004). ("This Court does not read exceptions into a statute nor may we impose requirements not mandated by the Legislature."). In fact, a reading of subsections A and B indicates subsection B was not intended to limit subsection A.

* * *

The district court's reading of subsection B to effectively limit subsection A would mean that the placement of "any wastes in a location where they are likely to cause pollution" could never be a public nuisance because subsection B requires the pollution to have occurred before the Executive Director of the ODEQ can act to abate the nuisance. This reading contradicts the plain language of Okla. Stat. tit. 27A, § 2-6-105. See *Villines v. Szczepanski*, 122 P.3d 466, 470 (Okla. 2005) ("It is presumed that the law-making body has expressed its intent in a statute's language and that it intended what it so expressed.").

Furthermore, the district court's reading also belies the legislative intent behind Okla. Stat. tit. 27A, § 2-6-105. The Oklahoma Legislature's intent that conduct that causes or is likely to cause pollution be declared a public nuisance is longstanding, and predates the enactment of the present subsection B. In fact, Okla. Stat. tit. 82, § 926(A), from which Okla. Stat. tit. 27A, § 2-6-105(A) was derived, had almost identical language. Notably, Okla. Stat. tit. 82, § 926.4 did not contain a parallel to Okla. Stat. tit. 27A, § 2-6-105(B). We agree with the amici that to conclude, upon adoption of § 926.4 and its relocation to § 2-6-105, that the Oklahoma Legislature intended to depart from its prior position, and to now require an ODEQ order before conduct could be declared a public nuisance, would call for a clearer linguistic signal than mere silence.

* * *

To require an order of abatement from the Executive Director of the ODEQ as a precondition to asserting a public nuisance claim under Okla. Stat. tit. 27A, § 2-6-105, not only undercuts the "additional and cumulative remedies" the code is intended to provide, but also precludes an action to "prevent" pollution under this section and would "impair or affect a person's right to recover damages for pollution," contrary to the express intent of the Legislature. See Okla. Stat. tit. 27A, § 2-3-506(A). This result would violate the maxim of statutory construction that "[w]hen possible, different provisions must be construed together to effect an harmonious whole." *Villines*, 122 P.3d at 471.

Burlington Northern, 2007 WL 2758502, *8-9

6. The *Burlington Northern* decision thus confirms that a finding by the Executive Director of the Oklahoma Department of Environmental Quality under subparagraph B of 27A Okla. Stat. § 2-6-105 is not a prerequisite to an action under 27A Okla. Stat. § 2-6-105(A).

Respectfully Submitted,

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I hereby certify that on this 19th day of October, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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